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ADMIRALTY LAW

SCOPE OF EMPLOYEE COVERAGE UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Pittston Stevedoring Corp. v. Dellaventura

In an effort to mitigate the inequities that existed with regard to worker's compensation coverage of shore-based maritime workers under the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA),¹ Congress amended the Act in 1972,² extending

¹ 33 U.S.C. §§ 901-950 (1970) (amended 1972). Prior to 1972, federal compensation benefits were available only to employees whose injuries occurred on the navigable waters of the United States and only if recovery had not been validly provided by state workmen's compensation laws. *Id.* § 903(a). The LHWCA reflected a strict "situs" orientation which had been developed through a long series of Supreme Court decisions reflecting the Court's determination to closely guard the federal maritime jurisdiction. *See, e.g.,* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917). *See generally* Larson, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts*, 45 S. CAL. L. REV. 699 (1972). The origins of the strict situs test are to be found in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), wherein the Supreme Court held that state compensation laws could not apply to persons injured within the federal maritime jurisdiction since to permit varied state remedies would jeopardize the uniformity of the law of admiralty. This decision left the shoreside worker with no workmen's compensation coverage if his injury occurred on the water side of the pier edge, a boundary that came to be known as the *Jensen* line. This harsh rule was modified in Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922), where the Court permitted application of state workmen's compensation laws to injuries occurring over navigable waters if the employee was engaged in matters of local rather than maritime concern.

The LHWCA, enacted in 1927, filled the gap that still existed with regard to amphibious workers such as longshoremen, who might be injured over navigable waters while engaged in maritime matters. *See* 33 U.S.C. §§ 902(3), 903(a), 903(4) (1970) (amended 1972). Since the Act stated that it was applicable only "if recovery . . . through workmen's compensation proceedings may not validly be provided by State law," *id.* § 903(a), it was generally interpreted as incorporating the *Rohde* "maritime but local" doctrine. Additionally, federal and state coverage were considered to be mutually exclusive. *See, e.g.,* G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-46, at 339 (1957); D. ROBERTSON, *ADMIRALTY & FEDERALISM* 208, 304-05 (1970). Uncertain as to whether employment was maritime or local, many workers sought the wrong remedy and many employers insured under the wrong system. *See* 1A E. BENEDICT, *ADMIRALTY* § 8 (7th rev. ed. E. Jhirad 1973) [hereinafter cited as BENEDICT].

In *Davis v. Department of Labor & Indus.*, 317 U.S. 249, 256 (1942), the Supreme Court alleviated the problem by recognizing a "twilight zone" into which the close "maritime but local" cases fell. If a claim were within this zone, a claimant might pursue either his state or federal remedy. *Id.* at 255-56. Finally, in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), the Court eliminated the need for a "twilight zone" by holding that all injuries occurring on navigable waters were compensable under the LHWCA. *Id.* at 126-27. Thus, situs became the determinant with respect to coverage. *See* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). For a detailed history of Supreme Court decisions from *Jensen* to the amendment of the LHWCA in 1972, see 1A BENEDICT, *supra*, §§ 1-13; G. GILMORE & C. BLACK, *THE LAW*

the "situs" of a compensable injury to shoreside harbor facilities adjoining navigable waters.³ At the same time, however, the amendments added an employee "status" requirement limiting benefits to "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations."⁴ Since the terms "maritime employment," "longshoreman," and

OF ADMIRALTY §§ 6-46 to 6-49 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK 2d].

Because all injuries occurring seaward of the *Jensen* line were compensable under the LHWCA, whereas those occurring landward of the water line were under the jurisdiction of state compensation laws, see, e.g., *Victory Carriers v. Law*, 404 U.S. 202 (1971), the situs test resulted in a disparity in benefits available to workers performing the same tasks dependant upon the site of their injury. See, e.g., *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), discussed in text accompanying notes 48-51 *infra*; Smith, *On the Waterfront at the Pier's Edge: The Longshoremen's and Harbor Workers' Compensation Act*, 56 CORNELL L. REV. 114 (1970); Comment, *The Longshoremen's and Harbor Workers' Compensation Act of 1927: Half-Way Protection for the Stevedore and the Longshoreman*, 64 MICH. L. REV. 1553 (1966).

² Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576 §§ 2-22, 86 Stat. 1251-65 (codified at 33 U.S.C. §§ 901-950 (Supp. V 1975)). These amendments were enacted by Congress both to raise benefits to an adequate level and to specifically remedy the disparity in benefits available to harbor workers performing the same tasks because of the strict situs requirement of the LHWCA. See S. REP. NO. 1125, 92d Cong., 2d Sess. 1, 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 1, 10 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698-99, 4708, wherein it was stated: "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." Congress recognized the disparity in benefits, both between federal and state compensation awards, and among the different state systems:

Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation provides benefits which are inadequate S. REP. NO. 1125, 92d Cong., 2d Sess. 12 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4707.

³ 33 U.S.C. § 903(a) (Supp. V 1975) (amending 33 U.S.C. § 903(a) (1970)). Whereas the original Act of 1927 limited coverage to the injuries occurring on navigable waters, including any drydock, the present version provides:

Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Id.

⁴ 33 U.S.C. § 902(3) (Supp. V 1975) (amending 33 U.S.C. § 902(3) (1970)). The amendments also included within the definition of "maritime employment" harborworkers, ship repairmen, shipbuilders, and shipbreakers. *Id.* Under the original Act, any employee not specifically exempted was covered, see 33 U.S.C. § 902(3) (1970) (amended 1972), provided that his employer had some workers engaged in maritime employment. *Id.* § 902(4).

"longshoring operations" were not defined, the years that have elapsed since the passage of the amendments have seen much speculation as to their meaning and the concomitant breadth of employee coverage.⁵ Until recently, however, there were no judicial pronouncements concerning the amendments.⁶ In *Pittston Stevedoring Corp. v. Dellaventura*,⁷ the Second Circuit confronted the task of interpreting the amendments, and held that maritime employees include, at the least, workers engaged in stripping, stuffing, and checking containers⁸ and workers employed in handling cargo during its journey between ship and consignee, provided that the latter employees have spent "significant" time in directly loading

⁵ See, e.g., 1A BENEDICT, *supra* note 1, §§ 18-19; GILMORE & BLACK 2d, *supra* note 1, § 6-51; Gorman, *The Longshoremen's Act After the 1972 Amendments*, 20 PRAC. LAW., May 1974, at 13; Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act*, 41 INS. COUNSEL J. 63 (1974) [hereinafter cited as Vickery].

⁶ During the past two years, at least six United States Courts of Appeals have considered the scope of coverage provided by the LHWCA. See *Sea-Land Serv., Inc. v. Director, Office of Workers' Comp. Programs*, 540 F.2d 629 (3d Cir. 1976); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed sub nom. P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 16, 1976) (No. 76-641), and *Halter Marine Fabricators, Inc. v. Nulty*, 45 U.S.L.W. 3450 (U.S. Jan. 4, 1977) (No. 76-880); *Stockman v. John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3332 (U.S. Nov. 2, 1976) (No. 76-571); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir.), *cert. granted sub nom. Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976) (No. 76-444); *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *aff'd in part and rev'd in part*, 542 F.2d 903 (4th Cir. 1976) (en banc), *petitions for cert. filed sub nom. Marine Terminals, Inc. v. Brown*, 45 U.S.L.W. 3401 (U.S. Nov. 30, 1976) (No. 76-706), and *Adkins v. I.T.O. Corp.*, 45 U.S.L.W. 3416 (U.S. Dec. 7, 1976) (No. 76-730); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 179 (1976).

⁷ 544 F.2d 35 (2d Cir.), *cert. granted sub nom. Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976) (No. 76-444).

⁸ A container is a receptacle in a rectangular metal module, similar in size and shape to a railroad car, which is carried on ships specially designed to accommodate many such units. Containers are generally packed (stuffed) with cargo or unpacked (stripped) in marshaling areas located some distance from a ship's side, but within the terminal area. For movement on land they are engineered to fit on chassis frames with wheels, and when so assembled the units become the trailer sections of tractor-trailer trucks. See Olson & Scrogin, *Containerization and Military Logistics*, 6 J. MAR. L. & COM. 119, 119-20, 123 (1974); Schmeltzer & Peavy, *Prospects and Problems of the Container Revolution*, 1 J. MAR. L. & COM. 203, 235-37 (1970) [hereinafter cited as Schmeltzer & Peavy].

Containerization has resulted in increased efficiency in the transportation of cargo since it requires fewer ships, fewer seamen to man them, and fewer longshoremen to load and unload them. Schmeltzer & Peavy, *supra* at 204, 235-37. In addition, the use of containers has reduced the complete turnaround time for a cargo vessel from 36 to 8 hours. Brief for International Longshoremen's Ass'n as Amicus Curiae at 11, *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976). The use of containers has been rapidly increasing, and it is estimated that "by 1980 approximately 85 percent of all commodities shipped in international traffic will be transported in containers." Olson & Scrogin, *supra*, at 126 (citation omitted).

and unloading cargo from a ship. The court also declared that for an injury to be compensable it must occur within the new situs boundaries of the Act.⁹

Pittston involved injuries sustained by employees of stevedoring companies while working in areas adjoining navigable waters.¹⁰

⁹ 544 F.2d at 56.

¹⁰ The case was a consolidation of four appeals from decisions of the Benefits Review Board of the Department of Labor (BRB). *Northeast Marine Terminal Co. v. Caputo*, 3 BEN. REV. BD. SERV. (MB) 13 (Ben. Rev. Bd. 1975), *aff'd*, 544 F.2d 35 (2d Cir.), *cert. granted*, 97 S. Ct. 522 (1976) (No. 76-444); *Pittston Stevedoring Corp. v. Dellaventura*, 2 BEN. REV. BD. SERV. (MB) 340 (Ben. Rev. Bd. 1975), *appeal dismissed as untimely*, 544 F.2d 35 (2d Cir. 1976); *Pittston Stevedoring Corp. v. Scaffidi*, 3 BEN. REV. BD. SERV. (MB) 47 (Ben. Rev. Bd. 1975), *dismissed as moot*, 544 F.2d 35 (2d Cir. 1976); *Blundo v. International Terminal Operating Co.*, 2 BEN. REV. BD. SERV. (MB) 376 (Ben. Rev. Bd. 1975), *aff'd*, 544 F.2d 35 (2d Cir.), *cert. granted*, 97 S. Ct. 522 (1976) (No. 76-454). Only *Caputo* and *Blundo* were decided on the merits. The *Scaffidi* petition was dismissed as a nonjusticiable controversy since the employer's insurance carrier had failed to contest the award and had already paid. 544 F.2d at 46. Rejecting the Stevedoring Company's contention that it was adversely affected by virtue of possible increased premiums it would be forced to pay, the Second Circuit dismissed the petition. *Id.* at 44-46, *citing* *Gange Lumber Co. v. Rowley*, 326 U.S. 295 (1945). *But see* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.13, at 272-73 (1958) (*Gange* decision is criticized); *cf.* K. DAVIS, ADMINISTRATIVE LAW TEXT § 22.08, at 438 (3d ed. 1972) (suggesting that minimal injury in fact should confer standing). Noting the criticism of *Gange* by Professor Davis, the Second Circuit declared that even if that case were to be overruled, the petitioner would not be an aggrieved party since the increased premiums asserted were merely a possibility. Moreover, the claimant would have retained his award even if the BRB's decision were reversed. 544 F.2d at 45.

The Second Circuit dismissed the employer's petition in *Dellaventura* for failure to file a timely petition for review pursuant to 33 U.S.C. § 921(c) (Supp. V 1975) (amending 33 U.S.C. § 921(b) (1970)), which requires a petition to be filed with the circuit court within 60 days after the issuance of the BRB's order. 544 F.2d at 42-44. The dismissal of *Dellaventura* made it unnecessary for the Second Circuit to resolve a procedural problem which has plagued several other circuits: Whether the Director of the Office of Workers' Compensation Programs of the Department of Labor or the BRB, or either, is a proper party respondent in an appeal taken to a United States Court of Appeals. Delegating the discussion to a footnote since the issue was raised only in *Dellaventura* and thus need not be resolved, *id.* at 42 & n.5, the court indicated in dictum that the BRB was the proper governmental respondent on appeal. *Id.* at 42 n.5 (dictum). Positing that review without the government as a party would be inappropriate even though sufficient adversity exists between the private parties, the court stated that the BRB, rather than the Director, appeared to be within the contemplation of 33 U.S.C. §§ 921(a), 921(c) (Supp. V 1975) (amending 33 U.S.C. §§ 921(a), 921(b) (1970)). 544 F.2d at 42 n.5, *citing* FED. R. APP. P. 15(a).

The BRB, however, sees itself not as "an administrative agency but [as] a judicial tribunal" akin to the United States Tax Court. Washington, *Benefit Review Board's New Appellate Process Under the Longshoremen's Act*, 11 FORUM 686, 695 (1976) [hereinafter cited as Washington] (author is Chairman of the BRB). Hence the BRB position is that it is not a proper party in appeals from its own decisions. *Id.* at 694. In contrast, the Director of the Office of Workers' Compensation Programs has asserted that he is the proper respondent by virtue of: his statutory mandate as the delegate of the Secretary of Labor to provide claimants with legal assistance, 33 U.S.C. § 939(c)(1) (Supp. V 1975); his duty to properly administer the Act, *see id.*; 20 C.F.R. § 701.202 (1976); and his standing as an aggrieved person, 33 U.S.C. § 921(c) (Supp. V 1975), since the Director is authorized to appear in

Employed as a "checker," claimant Blundo slipped on some ice as he was in the process of checking the contents of a container on the 19th Street pier in Brooklyn, New York. The container had been removed from a vessel at a different pier and then transported to the 19th Street facility for inspection by the United States Customs Service before being released to the consignee.¹¹

Claimant Caputo was employed at times as a terminal operator and at times as a longshoreman. His injuries occurred inside a consignee's truck while he was helping load boxes of cheese from the pier. This cargo had been discharged from a ship five days before and had been moved to a holding area to await pickup. In the course of Caputo's varied duties, he was required to spend some time working aboard ships.¹²

In both cases compensation benefits were awarded by an administrative law judge.¹³ Finding that the claimants were within the coverage section of the amended LHWCA, satisfying both situs and status requirements, the Benefits Review Board (BRB)¹⁴ affirmed the awards.¹⁵ An appeal was taken to the Second Circuit by the employers who contested the propriety of the awards, contending that the claimants' employment was not "maritime" in nature, and

proceedings before the BRB, 20 C.F.R. § 702.333(b) (1976). *I.T.O. Corp. v. Benefits Review Bd.*, 542 F.2d 903, *passim* (4th Cir. 1976) (en banc), *petitions for cert. filed sub nom. Marine Terminals, Inc. v. Brown*, 45 U.S.L.W. 3401 (U.S. Nov. 30, 1976) (No. 76-706), and *Adkins v. I.T.O. Corp.*, 45 U.S.L.W. 3417 (U.S. Dec. 7, 1976) (No. 76-730).

The circuits that have addressed this issue have reached conflicting results. In contrast to the dicta of the Second Circuit, the District of Columbia Circuit has held that the BRB is not a proper respondent. Supporting the Board's position that it is an independent judicial tribunal, the court stated: "To require the Board to appear as a party would parallel requiring the District Court to appear and defend its decision upon direct appeal." *McCord v. Benefits Review Bd.*, 514 F.2d 198, 200 (D.C. Cir. 1975) (per curiam); *accord*, *Nacirema Operating Co. v. Benefits Review Bd.*, 538 F.2d 73, 75 (3d Cir. 1976). The Fourth Circuit, although agreeing with the District of Columbia Circuit that the BRB is not a proper party, *I.T.O. Corp. v. Benefits Review Bd.*, 542 F.2d at 907 n.4, has also agreed with the *Pittston* court's opinion that the Director is not a proper respondent. *Id.* at 906-09. Thus, the Fourth Circuit has decided that government participation in an appeal is unnecessary. *Id.* at 907 n.4.

¹¹ 544 F.2d at 41.

¹² *Id.* at 42, 54.

¹³ *Id.* at 41-42. The administrative process under the amended LHWCA provides for an initial hearing before an administrative law judge in accordance with § 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (1970). 33 U.S.C. § 919(d) (Supp. V 1975).

¹⁴ The 1972 amendments established the Benefits Review Board to hear appeals from decisions of the administrative law judge. 33 U.S.C. § 921(b) (Supp. V 1975). A final order of the Board is reviewable in a United States Court of Appeals. *Id.* § 921(c). For a discussion of the new appellate process, see Washington, *supra* note 10, at 686-96.

¹⁵ *Caputo v. Northeast Marine Terminal Co.*, 3 BEN. REV. BD. SERV. (MB) 13 (Ben. Rev. Bd. 1975); *Blundo v. International Terminal Operating Co.*, 2 BEN. REV. BD. SERV. (MB) 376 (Ben. Rev. Bd. 1975).

hence not within the ambit of the Act.¹⁶ Traditionally, the process of loading and unloading cargo from seagoing vessels has been considered maritime employment.¹⁷ In the view of the *Pittston* employers, however, this process must involve a direct connection with a ship, *i.e.*, loading and unloading can only occur between the vessel and the last (loading) or first (unloading) "point of rest" of the cargo on the pier.¹⁸ Since the claimants' activities took place beyond these limits, the employers argued the employment was not maritime.¹⁹ In contrast, the BRB position was that the loading/unloading process begins when cargo arrives at the pier for shipment outbound, and ends when inbound cargo is deposited in a consignee's conveyance.²⁰ Faced with these divergent contentions, the Second Circuit had the definitional task of constructing the parameters of employee coverage.

In affirming the BRB's decision, Judge Friendly, writing for a majority of the panel,²¹ took a broad view of the coverage provisions of the Act. Noting the remedial nature of the amendments and the liberal construction which should be afforded such legislation,²² the court rejected the petitioners' "point of rest" theory as being too narrow in scope.²³ To support this conclusion, Judge Friendly

¹⁶ 544 F.2d at 46-47.

¹⁷ See, *e.g.*, *Atlantic Transp. Co. v. Imbroke*, 234 U.S. 52, 61-62 (1914); *Drumgold v. Plovba*, 260 F. Supp. 983 (E.D. Va. 1966) (mem.).

¹⁸ 544 F.2d at 46-47. "Point of rest" is generally defined as the first storage or holding area after the cargo leaves the ship or the last storage or holding area for the cargo before it is taken aboard the ship. See, *e.g.*, *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080, 1087 (4th Cir. 1975), *aff'd in part and rev'd in part*, 542 F.2d 903 (4th Cir. 1976) (en banc), *petition for cert. filed sub nom. Marine Terminals, Inc. v. Brown*, 45 U.S.L.W. 3401 (U.S. Nov. 30, 1976) (No. 76-706), and *Adkins v. I.T.O. Corp.*, 45 U.S.L.W. 3417 (U.S. Dec. 7, 1976) (No. 76-730). Support for this position may be found in *Vickery*, *supra* note 5, at 68.

¹⁹ 544 F.2d at 46-47.

²⁰ *Id.* at 47. The BRB has consistently taken this position. See, *e.g.*, *Watson v. John T. Clark & Son*, 2 BEN. REV. BD. SERV. (MB) 47 (Ben. Rev. Bd. 1975); *Ford v. P.C. Pfeiffer Co.*, 1 BEN. REV. BD. SERV. (MB) 367 (Ben. Rev. Bd. 1975), *aff'd sub nom. Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed sub nom. P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 16, 1976) (No. 76-641), and *Halter Marine Fabricators, Inc. v. Nulty*, 45 U.S.L.W. 3450 (U.S. Jan. 4, 1977) (No. 76-880); *Avvento v. Hellenic Lines, Ltd.*, 1975 A.M.C. 153, 1 BEN. REV. BD. SERV. (MB) 174 (Ben. Rev. Bd. 1974).

²¹ Judge Oakes joined Judge Friendly for the majority; Judge Lumbard dissented on the issue of scope of coverage.

²² 544 F.2d at 51, *citing* *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

²³ 544 F.2d at 51 n.18. Before proceeding with its analysis of the amendments, the *Pittston* court first rejected several arguments advanced by the parties. The court declined to accept claimants' contention that it should apply the presumption of coverage found in 33 U.S.C. § 920(a) (1970), which provides that in questionable cases, doubt should be resolved in favor of coverage. 544 F.2d at 48. Finding that the issue at hand was "an interpretative question of general import," the court explained that the presumption is operative only after

a definitional line has been established judicially, and applies to questionable cases falling near that point.

Turning to the claimants' contention that deference is owed to decisions of administrative agencies such as the BRB, the *Pittston* majority noted conflicting Supreme Court decisions on the issue and concluded that when the matter is one of statutory interpretation, a court has discretion to substitute its judgment for that of the agency. *Id.* at 49; see K. DAVIS, ADMINISTRATIVE LAW TEXT § 30.05, at 551-55 (3d ed. 1972). In the instant case the choice not to defer was predicated on the following determinations: (1) the BRB is not a policymaking body with a need for flexibility; (2) it has not developed a record based on thorough analysis of the maritime industry, but has instead decided individual cases as they arose without establishing definitive guidelines; (3) the BRB had little expertise at the time it began its work, and yet it has based its subsequent decisions on its initial inexperienced judgments; (4) a court has greater competence in statutory interpretation. 544 F.2d at 49-50. The factors influencing the *Pittston* court are consistent with the criteria enumerated by Professor Davis in K. DAVIS, ADMINISTRATIVE LAW TEXT § 30.07, at 556 (3d ed. 1972).

A contrary decision was reached by the Fifth Circuit in *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed sub nom. P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 16, 1976) (No. 76-641), and *Halter Marine Fabricators, Inc. v. Nulty*, 45 U.S.L.W. 3450 (U.S. Jan. 4, 1977) (No. 76-880). There, the court stated that it would not substitute its judgment for that of the agency, "so long as [that judgment] is supported by substantial evidence on the record considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusions." 539 F.2d at 541; *accord*, *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080, 1091-93 (4th Cir. 1975) (dissenting opinion), *aff'd in part and rev'd in part*, 542 F.2d 903 (4th Cir. 1976) (en banc), *petitions for cert. filed sub nom. Marine Terminals, Inc. v. Brown*, 45 U.S.L.W. 3401 (U.S. Nov. 30, 1976) (No. 76-706), and *Adkins v. I.T.O. Corp.*, 45 U.S.L.W. 3417 (U.S. Dec. 7, 1976) (No. 76-730).

In addition to the foregoing issues, the petitioners raised a constitutional question, contending that by extending the definition of navigable waters to include land areas, see 33 U.S.C. § 903(a) (Supp. V 1975), Congress had exceeded its power to legislate under the federal maritime jurisdiction. Traditionally, the maritime tort jurisdiction was limited to the locality of the navigable waters, while maritime jurisdiction over contracts, was unlimited as to locale and extended to all agreements made in connection with sea-related commerce, *DeLovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776). The Second Circuit summarily disposed of the constitutional claim, upholding congressional power to legislate in this area on the basis of several Supreme Court decisions. Citing *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963), wherein the Court applied without question the Admiralty Extension Act of 1948, 46 U.S.C. § 740 (1970), which extended federal maritime tort jurisdiction to injuries occurring on land through the instrumentality of seagoing vessels, and *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 224 (1969), in which the Court expressly invited Congress to extend federal workmen's compensation coverage landward, the *Pittston* court found no constitutional bar to the legislation under federal maritime tort jurisdiction. 544 F.2d at 57. Moreover, the court indicated that even were this tort jurisdiction inadequate, the amendments would certainly be an appropriate exercise of the maritime contract power since employment contracts of maritime workers were involved. *Id.* See *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 (1969), in which the Court stated: "Congress might have extended coverage to all longshoremen by exercising its power over maritime contracts."

It might be argued that the status requirement of the amendments was influenced by the possible jurisdictional problem since it appears that were there no status requirement providing a nexus between maritime employment and a covered worker, an employment contract could not be the basis of federal jurisdiction. This problem was examined by the Fifth Circuit in *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed sub nom. P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 16, 1976) (No. 76-641), and *Halter Marine Fabricators, Inc. v. Nulty*, 45 U.S.L.W. 3450 (U.S. Jan. 4, 1977) (No. 76-880), which dealt in part with an employee who was injured on land while engaged in ship building. Since this activity traditionally has not been considered within the maritime

pointed to the language of the amendments which defines the term "employee,"²⁴ and found that "any longshoreman or other person engaged in longshoring operations" is included within the broader phrase "any person engaged in maritime employment."²⁵ Furthermore, the inclusion of "any longshoreman" as a category separate from a "person engaged in longshoring operations" demonstrates that Congress contemplated protection for a longshoreman "even when he is not engaged in traditional longshoring activity."²⁶ Thus, even assuming, *arguendo*, that "longshoring operations" can occur only within the "point of rest" parameters, the court declared that limiting coverage to this narrow area could not have been intended.²⁷

Turning then to the legislative history for guidance in determining the definition of "longshoreman," Judge Friendly noted that the language of the amendments was certainly influenced by congressional recognition of the changes wrought by containerization and other modern shipping techniques which result in longshoremen doing more work on shore now than in the past.²⁸ "Stripping a container of goods destined to different consignees," noted the *Pittston*

jurisdiction of the federal government, *see, e.g.*, *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922), the coverage provisions of the amendments were attacked as being outside both federal maritime tort and contract jurisdictions. 539 F.2d at 544-45. Declaring that Congress has the power to expand maritime jurisdiction, the Fifth Circuit held that the 1972 amendments were a constitutionally valid exercise of that power. *Id.* at 545-46. *But see* Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683, 692 (1973), in which the author states that the coverage provisions of the amendments would be unconstitutional if based on federal maritime jurisdiction alone, and suggests that the commerce clause provides a better jurisdictional peg; *cf. Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 271 (1973) (crash of airliner into navigable waters not a sufficient nexus to confer admiralty jurisdiction; however, Congress could pass uniform aviation legislation under the commerce clause).

²⁴ The LHWCA defines employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . ." 33 U.S.C. § 902(3) (Supp. V 1975).

²⁵ 544 F.2d at 52. This position finds support in 1A BENEDICT, *supra* note 1, § 16, wherein it is stated:

[L]ongshoremen and persons performing longshoring operation are specifically included [within the definition of "employee"], and so are harbor workers, shipbuilders, and ship breakers so that in the case of such persons it is quite unnecessary to engage in any abstract discussion of the meaning of the term "maritime employment."

Id. (footnote omitted).

²⁶ 544 F.2d at 52.

²⁷ *Id.*

²⁸ *Id.* at 53. *See* S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4707-08.

majority, "is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds."²⁹ In view of Congress' recognition of the "container revolution,"³⁰ together with its clear intent to provide coverage for workers engaged in the loading and unloading of vessels,³¹ the court concluded that men who load and unload containers are within the class "longshoremen" and are protected by the Act so long as they meet the situs test.³² Moreover, finding that the legislative history of the amendments clearly shows that checkers of container cargo are within the contemplation of the Act, Judge Friendly indicated that Blundo must be considered a covered longshoreman.³³

The court then considered the status of Caputo. It has never been disputed that a worker engaged in loading and unloading who is in direct contact with the ship is a bona fide longshoreman.³⁴ Since Caputo's injury occurred while he was loading a truck at some

²⁹ 544 F.2d at 53.

³⁰ The term is used by Schmeltzer & Peavy, *supra* note 8.

³¹ This intent is stated in the negative: "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4708.

³² 544 F.2d at 53.

³³ The court declared that "'checkers . . . who are directly involved in the loading and unloading functions are covered by the new amendment.'" *Id.*, *quoting* S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4708. The court went no further in its definition of "longshoremen" than to place container workers within that class. Judge Friendly did indicate, however, that the class does not include everyone who calls himself a longshoreman, nor everyone who belongs to a longshoreman's union. 544 F.2d at 52. *But cf.* *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 962 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 179 (1976) (membership in a nonmaritime union is evidence that claimant is not engaged in maritime employment).

Support for the position that workers who stuff, strip, and check containers are longshoremen may be found in *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970). There, the court observed: "Historically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Id.* at 886; *accord*, *Humphrey v. International Longshoremen's Ass'n*, 401 F. Supp. 1401, 1406 (E.D. Va. 1975); *cf.* *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971) (a container is "functionally a part of a ship").

³⁴ *See, e.g.*, *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 886 (2d Cir. 1970); *MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY* 1334 (3d ed. 1971); 1 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 3, at 7 (3d ed. 1975), *quoted in note* 81 *infra*.

distance from a vessel's side,³⁵ and therefore did not fall either within this accepted definition or within the class of container-related longshoremen, Judge Friendly turned to a consideration of his coverage as a "person engaged in longshoring operations."³⁶ Taking the broad view of the loading/unloading process as not complete until cargo has been delivered to a consignee,³⁷ and noting the congressional desire to provide "uniformity of coverage for persons engaged in the loading or unloading functions on the piers,"³⁸ the majority concluded: "The committees' language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels."³⁹ As a result of the foregoing analysis, the *Pittston* court held that in addition to bona fide longshoremen, the Act's coverage extends to work-related injuries sustained within its situs by employees who handle cargo in the total loading/unloading process, *provided* that such cargo handlers have "spent a significant part of [their] time in the typical longshoring activity of taking cargo on or off a vessel."⁴⁰

Judge Lumbard dissented from the majority's view with respect to the amendments' scope.⁴¹ Finding the "point of rest" limits definitive of maritime employment and more in harmony with congressional intent, he noted their additional virtue of providing ease of application.⁴² Since the injuries sustained by both Blundo and Caputo occurred well beyond the "point of rest" boundaries, the dissent would have set aside the compensation awards.⁴³

³⁵ See text accompanying note 12 *supra*.

³⁶ 544 F.2d at 54-55.

³⁷ *Id.* at 53 & n.21.

³⁸ *Id.* at 54. See S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10-11, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4708.

³⁹ 544 F.2d at 54.

⁴⁰ *Id.* at 56. Noting that this was as far as he need go to resolve the instant cases, and stating his uncertainty as to the necessity for retaining the proviso in future determinations, Judge Friendly did indicate, however, that he would not go so far as to eliminate the status requirement entirely. *Id.* Thus, the *Pittston* court "parted company" with Professors Gilmore and Black with regard to their suggestion that all employment related injuries within the situs of the Act should be covered. *Id.* at 56 & n.27. See GILMORE & BLACK 2d, *supra* note 1, § 6-51, criticized in Owen, Book Review, 7 J. MAR. L. & COM. 736, 742 (1976).

⁴¹ 544 F.2d at 57 (Lumbard, J., concurring and dissenting). Judge Lumbard concurred only in the dismissals of *Dellaventura* and *Scaffidi*, discussed in note 10 *supra*.

⁴² 544 F.2d at 57. The dissent relied on *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *aff'd in part and rev'd in part*, 542 F.2d 903 (4th Cir. 1976) (en banc), *petitions for cert. filed sub nom. Marine Terminals, Inc. v. Brown*, 45 U.S.L.W. 3401 (U.S. Nov. 30, 1976) (No. 76-706), and *Adkins v. I.T.O. Corp.*, 45 U.S.L.W. 3417 (U.S. Dec. 7, 1976) (No. 76-730), discussed in notes 45-54 and accompanying text *infra*.

⁴³ 544 F.2d at 58.

The *Pittston* holding represents a step toward a broad and humanitarian approach to the construction of the 1972 amendments, and, it is submitted, is an appropriate and reasonable interpretation falling between the extremes espoused by other authorities.⁴⁴ Illustrative of the narrow view, is the Fourth Circuit's opinion in *I.T.O. Corp. v. Benefits Review Board*,⁴⁵ a decision heavily relied on by the *Pittston* dissent.⁴⁶ The *I.T.O.* court held that the area of coverage was bounded by the first or last "points of rest."⁴⁷ In reaching this conclusion, the majority emphasized the fact that the amendments were passed in "direct response" to the 1969 holding of the Supreme Court in *Nacirema Operating Co. v. Johnson*⁴⁸ and the invitation to extend the jurisdiction of the LHWCA issued to Congress by the Court in that case.⁴⁹

Nacirema involved four longshoremen who were working on a pier, attaching cargo to a ship's crane for loading. The crane swung

⁴⁴ One extreme is expressed in GILMORE & BLACK 2d, *supra* note 1, § 6-51, wherein the authors state:

The Reports do not read as if they had been divinely inspired. As essays in statutory construction, they do not commend themselves. Apart from the gloss suggested by the Reports, the 1972 coverage amendments can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits. And a female secretary who works in a terminal warehouse should qualify as an LHCA harbor worker in exactly the same way that a female hair-dresser in a cruise ship's beauty salon qualifies as a Jones Act seaman.

Id., at 430. For consideration of the other extreme, see Vickery, *supra* note 5, wherein the author observes:

The amendments draw a distinction between "longshoring operations" and "maritime terminal operations". Thus the basic question is: When does the loading or unloading process begin and end? It is generally considered that the loading process begins when cargo is picked up from a point of rest on a dock or marine terminal.

Id. at 68.

⁴⁵ 529 F.2d 1080 (4th Cir. 1975), *aff'd in part and rev'd in part*, 542 F.2d 903 (4th Cir. 1976) (en banc), *petitions for cert. filed sub nom. Marine Terminals, Inc. v. Brown*, 45 U.S.L.W. 3401 (U.S. Nov. 30, 1976) (No. 76-706), and *Adkins v. I.T.O. Corp.*, 45 U.S.L.W. 3417 (U.S. Dec. 7, 1976) (No. 76-730).

⁴⁶ See 544 F.2d at 57 (Lumbard, J., dissenting).

⁴⁷ 529 F.2d at 1081.

⁴⁸ 396 U.S. 212 (1969).

⁴⁹ Apparently displeased by the results of its decision in *Nacirema*, the Supreme Court declared:

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. . . . The invitation to move that line [for coverage] landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24.

back and hit the men, throwing three to the pier and one into the water where he drowned. Since the situs test of the pre-amended LHWCA required an injury to occur on navigable waters,⁵⁰ benefits were denied to the three men who remained on the pier, while coverage extended to the drowned longshoreman.⁵¹

The *I.T.O.* majority maintained that the amendments were enacted to remedy precisely this kind of situation which could occur only within the "point of rest" parameters. In effect, the court found that any activity landward of these boundaries is not maritime employment.⁵² That this interpretation was appropriate, the court stated, was further evidenced by the congressional intent "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity."⁵³ Reading this language as a limitation on coverage, the Fourth Circuit declared that the only effect of the amendments was to provide complete coverage to employees who had been partially covered under the old provisions. Thus, in the Fourth Circuit's view, coverage extends only to those workers whose employment brings them sufficiently close to navigable waters that they might actually be injured upon them.⁵⁴

⁵⁰ 33 U.S.C. § 903 (1970) (amended 1972), discussed in note 1 *supra*.

⁵¹ The case of the drowned longshoreman was not taken to the Supreme Court. See *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968), *rev'd sub nom. Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

⁵² 529 F.2d at 1086-87.

⁵³ *Id.* at 1086, quoting H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10-11 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4708.

⁵⁴ 529 F.2d at 1087 (by implication). The *I.T.O.* court reviewed awards made to three employees under the amended LHWCA. Adkins had been injured while loading cargo into a consignee's truck. The cargo had previously been stripped from a container which had been unloaded from a ship. *Id.* at 1082. Brown suffered carbon monoxide poisoning while moving barrels of chemicals to a container for stuffing prior to being placed aboard a vessel. *Id.* Harris was injured while moving an already stuffed container toward a marshaling area located near a ship. The containers assembled in this area were then moved aboard a vessel. *Id.*

The strict "point of rest" holding of the majority denied recovery to all three claimants, since their injuries had occurred outside these limits. *Id.* at 1087-88. The *I.T.O.* dissent, in contrast, preferred the broad interpretation of maritime employment, and would have affirmed the BRB's decisions. *Id.* at 1089 *passim* (Craven, J., dissenting). Although asserting that "[a] consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference," *id.* at 1091, quoting *NLRB v. Boeing*, 412 U.S. 67, 75 (1973), and that the BRB should be affirmed on that basis alone, the dissent's independent analysis was consonant with the BRB position. 529 F.2d at 1095-101.

Although *I.T.O.* was subsequently reheard en banc, *I.T.O. Corp. v. Benefits Review Bd.*, 542 F.2d 903 (4th Cir. 1976) (en banc), no clear rule emerged from the decision. The three judges who took part in the original decision maintained their polarized positions. Each side acquired one new advocate, and the remaining judge, although acquiescing in the "point of rest" theory, moved that point inland to a location in which "[t]he cargo was not merely

In contrast to this restrictive view, the BRB appears to have expanded the Act's scope to its furthest possible limits.⁵⁵ In addition to defining the loading/unloading process liberally,⁵⁶ the Board has consistently held that a maritime employee need not be actually engaged in loading or unloading cargo at the time of his injury to be covered by the Act.⁵⁷ Moreover, a warehouseman lifting cargo into a consignee's truck has been held by the BRB to be engaged in the last step of the unloading process, even after title has passed to the consignee.⁵⁸ Indeed, the BRB has held that even an office clerk employed within the situs of the Act is protected, since the processing of papers is an essential part of the loading/unloading operation.⁵⁹ Furthermore, since in the Board's view the purpose of the amendments was to extend, rather than to narrow coverage, all classes of persons eligible for benefits prior to enactment of the amendments are still covered.⁶⁰

being moved to [or from] storage for convenience or facility . . . [but] was in the process of being loaded [or unloaded] on board ship" *Id.* at 905. This relocated "point of rest" appears to be the first or last holding area for the cargo as it leaves, or before it enters a container. *See id.* Compensation awards to Brown and Harris were approved, the deciding vote being cast by the judge who moved the "point of rest" landward. *Id.* Because his injury occurred beyond the adjusted point, benefits were denied to Adkins. *Id.*

⁵⁵ *See* Doak & Hecker, *Is It a New Ball Game? — The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 11 FORUM 544, 549-50 (1976).

⁵⁶ *See, e.g.*, cases cited note 20 *supra*. Subsequent to the *I.T.O.* decision the BRB again rejected the "point of rest" theory, stating:

The Board is well aware of the restrictive interpretation given the status requirement by the Fourth Circuit Court of Appeals in the recent case of *I.T.O. Corporation of Baltimore v. Adkins*. However, we are of the opinion that our interpretation with regard to coverage is more in keeping with the amended statute and the legislative history, and we will continue to follow the line of reasoning developed in previous decisions and reiterated in this case.

Bradshaw v. J.A. McCarthy, Inc., 3 BEN. REV. BD. SERV. (MB) 195, 198 (Ben. Rev. Bd. 1976) (citations omitted); *accord*, *Toomer v. Machinery Rental & Employers Nat'l*, 4 BEN. REV. BD. SERV. (MB) 256 (Ben. Rev. Bd. July 23, 1976).

⁵⁷ *See, e.g.*, *Coppolino v. International Terminal Operating Co.*, 1974 A.M.C. 2423, 1 BEN. REV. BD. SERV. (MB) 205 (Ben. Rev. Bd. 1974) (longshoreman injured while replacing paper in a copying machine).

⁵⁸ *Richardson v. Great Lakes Storage & Contracting Co.*, 2 BEN. REV. BD. SERV. (MB) 31 (Ben. Rev. Bd. 1975) (delivery of documents does not alter the character of employee's work).

⁵⁹ *Farrell v. Maher Terminals, Inc.*, 3 BEN. REV. BD. SERV. (MB) 42 (Ben. Rev. Bd. 1975).

⁶⁰ *See, e.g.*, *Sharp v. Pacific Gas & Elec. Co.*, 2 BEN. REV. BD. SERV. (MB) 381 (Ben. Rev. Bd. 1975) (drowned scuba diving teacher is covered); *Gilmore v. Weyerhaeuser Co.*, 1975 A.M.C. 811, 1 BEN. REV. BD. SERV. (MB) 180 (Ben. Rev. Bd. 1974), *rev'd*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 179 (1976). In reversing the BRB in *Gilmore*, the Ninth Circuit found that a "pondman" who was injured on a floating walkway over navigable waters while sorting logs was not a maritime employee within the contemplation of the amendments. 528 F.2d at 961-62. Rejecting the Board's determination that all persons eligible for benefits

It is submitted that the BRB's interpretation is unduly expansive and thus contravenes congressional intent.⁶¹ While it has been suggested that since "there can be nothing more maritime than the sea, every employment on the sea or other navigable waters should be considered as maritime employment,"⁶² the Board's inclusion of anyone previously covered disregards the status requirement established by Congress.⁶³ The strict "point of rest" theory, however, is equally unsatisfactory. It appears unduly restrictive in failing to recognize the container revolution and its effect on the nature of the waterfront activity, a factor specifically noted by Congress.⁶⁴ Additionally, such narrow limits to coverage would appear to frustrate the congressional desire for uniformity by constructing yet another artificial barrier between employees engaged in the same type of operations.⁶⁵

While approaching the statutory analysis from differing directions, other circuits which have considered the scope of the 1972 amendments have taken positions similar to that of the *Pittston* court, short of that espoused by the BRB but beyond the "point of rest" parameters established by the Fourth Circuit. In *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation*

under the original LHWCA are still covered, the court stated that "to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment." *Id.* at 961.

⁶¹ See Doak & Hecker, *Is It a New Ball Game? — The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 11 FORUM 544, 549-50 (1976).

⁶² 1A BENEDICT, *supra* note 1, § 17 (footnotes omitted). See, e.g., *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

⁶³ See S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4708. The pertinent section appears in note 31 *supra*. In contrast to the BRB's approach, see text accompanying note 59 *supra*, coverage for clerical workers was expressly disapproved by Congress in the following passage: "Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4708. But see GILMORE & BLACK 2d, *supra* note 1, § 6-51, at 430; Comment, *Broadened Coverage Under the LHWCA*, 33 LA. L. REV. 683, 694 (1973).

⁶⁴ See S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4707-08.

⁶⁵ See 544 F.2d at 54. Judge Friendly discussed a hypothetical in which a single longshoreman, after being engaged in an activity within the "point of rest" parameters, might then move the cargo away from its first "point of rest" to another holding area further inland. Under the narrow coverage theory, this worker would have walked out of the protected area during his second operation. Judge Friendly found that such a result would be contrary to the congressional desire for uniformity of coverage. *Id.*

Programs,⁶⁶ the Third Circuit was presented with a claim by a tractor rig driver who was required to haul containers and crates through city streets between two waterfront facilities. Having transported a container recently unloaded from a ship to another berth for storage, he was injured on his return trip while hauling a crate. The accident occurred on a city street.⁶⁷ In contrast to the Second Circuit's reasoning, the *Sea-Land* court did not attempt to define the terms "longshoreman" or "person engaged in longshoring operations" as criteria for coverage, but instead dealt with the broader category "any person engaged in maritime employment."⁶⁸ The court emerged with a definition of this term which encompasses all workers engaged in the movement of cargo in connection with its waterborne mode of transportation until its delivery to a person involved in land or air transportation. According to the Third Circuit, "[t]he key is the functional relationship of the employee's activity to maritime transportation"⁶⁹ Since the *Sea-Land* claimant was employed by an intermodal carrier engaged in both land and water transportation of goods, and it was not clear in which phase of the business the claimant was participating at the time of the accident, the case was remanded to the BRB to make that determination.⁷⁰

Rejecting job classification entirely as a basis for coverage, the Fifth Circuit, in *Jacksonville Shipyards, Inc. v. Perdue*,⁷¹ relied instead on the congressional language which stated that a worker

⁶⁶ 540 F.2d 629 (3d Cir. 1976).

⁶⁷ *Id.* at 632, 639.

⁶⁸ *Id.* at 638. The court first found that Congress intended coverage for all "maritime" employees. *Id.* Having made this determination, the Third Circuit then disposed of the situs problem by holding that coverage of an employee engaged in a protected activity is not necessarily vitiated simply because the injury does not occur in a locality enumerated in 33 U.S.C. § 903(a) (Supp. V 1975). The *Sea-Land* court stated: "The limit of federal coverage is defined not by reference to a geographic relationship with the navigable waters of the United States, but by the location of the interface between the air land and the water modes of transportation." 540 F.2d at 638.

⁶⁹ 540 F.2d at 638.

⁷⁰ The court found that the claimant was clearly engaged in a waterborne transportation activity during his initial trip since he was hauling a container that had recently been taken off a ship. *Id.* at 639. Since information was lacking with regard to both the contents and the ultimate destination of the crate being carried at the time of the accident, however, it was impossible to determine whether the claimant was then performing a land or water function. *Id.*

⁷¹ 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed sub nom. P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 16, 1976) (No. 76-641), and *Halter Marine Fabricators, Inc. v. Nulty*, 45 U.S.L.W. 3450 (U.S. Jan. 4, 1977) (No. 76-880). The court found that definitions of "maritime employment" developed prior to the amendments were irrelevant since they spoke to the limited coverage of the former Act. 539 F.2d at 538-39.

would be covered if he were "‘engaged in loading, unloading, repairing, or building a vessel.’"⁷² In this court's view, the sole test is whether, at the time of his injury, an employee was *actually engaged* or *directly involved* in loading, unloading, repairing, or building a ship.⁷³ Since the Fifth Circuit expressly rejected the "point of rest" theory and embraced a broad view of loading and unloading,⁷⁴ its interpretation is an expansive one, as evidenced by its holding that a claimant who was injured while securing cargo to a railway car for inland transportation was engaged in the final step of the unloading process and was therefore covered.⁷⁵

Asked to decide whether a claimant injured while stripping a container was within the ambit of the 1972 amendments, the First Circuit answered in the affirmative in *Stockman v. John T. Clark & Son*.⁷⁶ Applying a rationale similar to that of the *Pittston* court, the First Circuit found that persons who stuff and strip containers are "bona fide longshoremen" whose injuries are compensable under the Act,⁷⁷ and that once this status is established no further showing is necessary.⁷⁸ While limiting its holding to this class of employees, the *Stockman* court expressly rejected the "point of rest" parameters and adopted the liberal view of the loading/unloading process,⁷⁹ implying that were the court to be presented with a claimant who was injured within the terminal area while performing some part of this total process, it would find him to be a member of a covered class of workers.⁸⁰

In the final analysis, the several tests enunciated by First, Third, and Fifth Circuits all appear to extend coverage to every employee engaged in the movement of cargo in the service of a waterborne transportation employer, if the employee was injured

⁷² *Id.* at 539, quoting S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 11 (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4708.

⁷³ 539 F.2d at 539-40.

⁷⁴ *Id.* at 540.

⁷⁵ *Id.* at 543. The cargo had arrived by ship several days before the accident, and had been held in the waterfront area awaiting transshipment. In upholding the claimant's compensation award under the amendments, the Fifth Circuit found that at the time of the injury, he was performing "an integral part of the process of moving maritime cargo from a ship to land transportation," and was therefore within the scope of the amendments.

⁷⁶ 539 F.2d 264 (1st Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3332 (U.S. Nov. 2, 1976) (No. 76-571).

⁷⁷ 539 F.2d at 276-77.

⁷⁸ The First Circuit stated: "Whatever the language of the committee reports, the statute itself calls for no additional showing once that status has been firmly established." *Id.* at 277.

⁷⁹ *Id.* at 275-76.

⁸⁰ *Id.* at 276-77.

while performing his duties within areas customarily used for loading and unloading waterborne commodities. This coverage seemingly obtains without regard to the first or last "point of rest,"⁸¹ the length of time that the cargo has been held on the pier awaiting a consignee's pickup, the transportation of the cargo through non-maritime areas, from one waterfront facility to another, and the amount of time, if any, that a worker engaged in loading or unloading has spent aboard a ship. All of the aforementioned circuits also apparently exclude nonlongshoring personnel such as clerical workers.

The bottom line in *Pittston* differs only with respect to Judge Friendly's proviso requiring direct contact with a ship for persons engaged in longshoring operations.⁸² It is submitted that this proviso is inappropriate. Having adopted the broad view of the loading/unloading process as definitive of longshoring operations, the *Pittston* court placed workers such as Caputo squarely within the ambit of the statute without need for the further requirement. If all longshoremen are covered without regard to time spent shipboard, it appears logical that all persons engaged in longshoring operations should enjoy the benefit of the same statutory construction.⁸³ Fur-

⁸¹ Judicial interpretations of loading and unloading, some expressed prior to the 1972 amendments, add support to this position. See, e.g., *Garrett v. Gutzeit O/Y*, 491 F.2d 228 (4th Cir. 1974); *Law v. Victory Carriers*, 432 F.2d 376 (5th Cir. 1970), *rev'd on other grounds*, 404 U.S. 202 (1971); *Spann v. Lauritzen*, 344 F.2d 204 (3d Cir.), *cert. denied*, 382 U.S. 938 (1965).

Additional support for this position is found in 1 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 3, at 7 (3d ed. 1975), wherein the author states: "Outside of cargo work in the holds, longshoremen are engaged in various tasks in connection with voyage preparation or termination . . . [T]he work may be performed *entirely on a pier* in the handling of mechanical equipment, or the storing, moving or loading of goods on the dock." *Id.* (footnote omitted) (emphasis added).

⁸² The *Pittston* court used the words "provided . . . that the employee has spent a significant part of his time in the typical longshoring activity of *taking cargo on or off a vessel*." 544 F.2d at 56 (emphasis added). It is not clear whether the court meant time actually aboard a vessel, or time spent within the first or last points of rest. The First Circuit has since interpreted the *Pittston* court's statement as requiring time aboard ship. *Stockman v. John T. Clark & Son*, 539 F.2d 264, 276 (1st Cir. 1976).

⁸³ The difficulty with extending protection to workers who spend their time entirely on shore stems in large part from the following sentence in the Committee Report: "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered for part of their activity." S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10-11 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4708. Since coverage prior to the amendments only obtained if an injury occurred on navigable waters, this sentence would seem to imply that part of a worker's time must still be spent on navigable waters. The First Circuit, however, has developed a more liberal interpretation of this statement:

While Congress did not mean in the 1972 amendments to cover new classes of

thermore, a consideration of the consequences of this proviso betokens serious problems in its application⁸⁴ and, more importantly, continuing disparities in coverage for shore-based harbor workers, dependent upon length of time spent aboard ship. It seems apparent that the intention of Congress was to create a comprehensive workmen's compensation statute for all those employees who are customarily thought of as longshoring workers,⁸⁵ and to avoid arbitrary cutoff points which would otherwise partition a homogeneous work force, and might provide only part time protection for an individual employee.⁸⁶

It is submitted that the better view is that articulated by the Third and Fifth Circuits, and suggested by the First.⁸⁷ This interpretation has the additional advantage of serving the goals of certainty and predictability of remedy for both employee and employer. It must be noted that Judge Friendly expressed his uncertainty about the necessity for retaining the proviso in subsequent determinations,⁸⁸ and no doubt the future will see amplification by the Second

employees not heretofore covered in part, we do not believe it meant to exclude from coverage those particular members of a covered group, e.g. longshoremen, whose individual duties do not happen to take them on shipboard. We read the language of the committee reports as requiring bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act — *not necessarily a demonstration by each claimant that he individually would have been covered.*

Stockman v. John T. Clark & Son, 539 F.2d 264, 277 (1st Cir. 1976) (emphasis added). It is submitted that this interpretation is more in harmony with the congressional intent to create uniformity of coverage.

⁸⁴ Initially, it would have to be determined whether an employee falls into the class of "bona fide longshoremen," or is merely a "person engaged in longshoring operations." Having made this difficult determination, it would then be necessary to ascertain whether the longshoring activity has included time spent in direct contact with a ship. Finally, the question of how much time is a "significant" amount would have to be resolved. Even then, a number of unanswered questions would remain. For example, would a longshoring worker, injured during his first day on the job, be covered if he had not yet stepped aboard a ship?

⁸⁵ See 118 CONG. REC. 36,385 (1972) (questions and answers submitted by Rep. Steiger). As Representative Steiger declared, "[t]he expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons customarily considered to be working in the business." *Id.*

⁸⁶ As indicated by the many questions posed by the *Pittston* court, 544 F.2d at 47, standard operating procedures with regard to the allocation of work assignments is unclear. Thus, it might be possible for an employee to operate as a container stripper on one day and thereby automatically be within the ambit of the Act, and on another day be assigned to move break-bulk cargo within the terminal area, and thus be subject to the *Pittston* proviso.

⁸⁷ Although finding it unnecessary to decide what requirements exist for maritime workers other than container workers, the First Circuit implied that time in actual contact with a ship would *not* be a critical issue. *Stockman v. John T. Clark & Son*, 539 F.2d at 277. See note 83 *supra*.

⁸⁸ 544 F.2d at 86.

Circuit. At any rate, since the Supreme Court has granted certiorari in *Pittston*,⁸⁹ it is to be hoped that the existing conflicts will soon be resolved.

Judith B. Yaeger

⁸⁹ *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976) (No. 76-444).